



1 arises when evidence has been destroyed and 1) the party in  
2 control of the evidence had an obligation to preserve it 2)  
3 the records were destroyed with a culpable state of mind and  
4 3) the reasonable trier of fact would have found the evidence  
5 relevant to the party's claim or defense. Jandreau v.  
6 Nicholson, 2007 WL 1892301 at \*2 (Fed. Cir.). If the  
7 destruction was routine with no fraudulent intent, the  
8 evidence is not presumed to have been favorable to the  
9 discovering party. Marjorie Shields, Annotation, Electronic  
10 Spoliation of Evidence, 3 A.L.R. 6th 13 (2005).

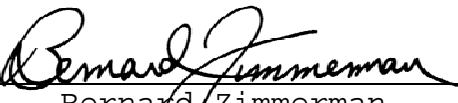
11 Plaintiff first seeks one or more emails that he claims  
12 were sent in 2000, which defendant cannot locate. Plaintiff  
13 produced no evidence to suggest that defendant had an  
14 obligation to preserve e-mail from 2000. Defendant has  
15 introduced evidence that he searched the mail server at Palo  
16 Alto CSPCC for emails sent between 1999 and mid-2001, and all  
17 relevant e-mails were sent to Dr. Hseih. Doherty Decl. ¶¶ 3,  
18 4. Defendant also introduced evidence of its document  
19 retention practices which show that starting in mid-2001,  
20 back-up tapes for Palo Alto CSPCC's most frequently used e-  
21 mail systems were routinely overwritten approximately every  
22 60-90 days. Raffin Decl. ¶¶ 3, 5. The VA's information  
23 systems do not backup personal computers, so if users delete  
24 text from documents while they are on their personal  
25 computers, the previous text cannot be retrieved. Rhodes  
26 Decl. ¶ 5. Moreover, network backup tapes do not go as far  
27 back as 2002 or earlier. Id. I therefore find that plaintiff  
28 has failed to establish that in 2000 or 2001, defendant had

1 any obligation to preserve the 2000 e-mails or that the e-  
2 mails were culpably destroyed.

3 Plaintiff also alleges that defendant should not have  
4 destroyed the survey responses. However, Dr. Hsieh's initial  
5 complaint of employment discrimination dated February 2, 2002  
6 makes no allegations that his survey response directly or  
7 indirectly related to his termination. See Konno Decl. ¶, Ex.  
8 A. Moreover, the survey was anonymous, and the original  
9 survey responses were destroyed in December 2002 to preserve  
10 the anonymity of the survey respondents. Churby Decl. ¶ 4. I  
11 therefore find that the plaintiff has failed to establish that  
12 the defendant had any obligation to preserve the survey  
13 responses or that he destroyed them culpably.

14 For these reasons, sanctions for spoliation are **DENIED**.

15 Dated: August 23, 2007

16   
17 Bernard Zimmerman  
United States Magistrate Judge

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